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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 989

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES and LOUIS HATIOS,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. .....

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES and LOUIS HATIOS,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent to the Court:

A. Summary Statement of Matter Involved.

Petitioners were indicted in the Southern District of New York for conspiracy to obstruct justice and to intimidate witnesses in a pending Federal criminal case in that District. There were two trials in the case at bar. The first trial lasting from June 17-28, 1940 resulted in the discharge of the jury during their deliberations. No reason for the discharge of the jury appears in the record, the minutes merely showing that eleven jurors returned to the court room and were discharged. When petitioners were placed on trial a second time, they filed a plea of double jeopardy

which was summarily overruled. The second trial then proceeded and resulted in the conviction of petitioners. The judgments of conviction were affirmed by the Circuit Court of Appeals for the Second Circuit. Petitioners assigned as error the overruling of their plea of double jeopardy, and contended that in the absence of Federal precedents there should be applied the common law rule that the reason for the discharge of the jury must be entered of record so that the propriety of the discharge may be reviewed. The Circuit Court of Appeals rejected the common law cases and laid down a new rule, that where eleven jurors return to the courtroom and are discharged without apparent reason, it must be inferred (1) that one of the jurors had become incapacitated to a degree which disabled him from continuing, and (2) that the judge properly exercised his discretion in ordering a mistrial. Such a holding destroys the long established rule that juries may not be discharged except where "manifest necessity" is shown, and that the discretion of the trial court is a controlled discretion.

As to petitioner Hatios, the Circuit Court of Appeals held that although there was no direct evidence whatever of conspiracy with the other appellants, conspiracy with them could be inferred from the fact that he attempted to suppress testimony in a case in which they (but not he) were defendants; and that the conviction of this petitioner was proper even though the only defendant with whom he could possibly have conspired was acquitted.

The Circuit Court left unanswered the contention that fatal variance results where an indictment alleges one large conspiracy and the proof in its most favorable aspect reveals two or more smaller conspiracies with no common members.

The Circuit Court also held that a prosecution witness may on direct examination corroborate his testimony by a

prior consistent statement, though his credibility has not been attacked.

B. Jurisdiction.

Petitioners were convicted of violating Section 88 of Title 18 U. S. C. This Court's jurisdiction rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

C. Questions Presented.

1. May defendants in a criminal case be placed on trial a second time under the same indictment when the record reveals no reason for the discharge of the jury at the first trial?

2. Does the decision of this Court in *Berger* v. *U. S.*, 295 U. S. 78, holding that fatal variance does not exist where two conspiracies with a common member are proved, apply to a case where the conspiracies have no common member?

3. Where a person not a defendant in a criminal case seeks to suppress testimony in that case, is this fact alone sufficient to convict him of conspiring with those who were actually defendants?

4. If a prosecution witness is permitted on direct examination and before his credibility is attacked to corroborate his testimony by a prior consistent statement, is the error harmless because the jury may have believed his story without the corroboration?

D. The Reasons Relied on for the Allowance of the Writ.

The first of the questions presented is one of first impression in the Federal courts, and bears on an important Constitutional right. The decision of the Circuit Court of

Appeals appears to be in conflict with the general doctrine laid down by this Court in *United States* v. *Perez,* 9 Wheat. 579 (1824). The second question involves the scope of a leading decision of this Court in a vital particular. As to the third question, the decision of the Circuit Court of Appeals is contrary to the doctrine many times laid down by this Court and most recently affirmed in *United States* v. *Falcone,* 311 U. S. 205 (1940), that knowledge of conspiracy must be brought home to the defendant. The fourth question relates to the emasculation by the Circuit Court of Appeals of the rule of *Ellicott* v. *Pearl,* 10 Pet. 412, 438 (1836).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a complete transcript of the record and all proceedings had in said Circuit Court of Appeals for the Second Circuit in the case there entitled United States of America, Appellee, *vs.* Irving Potash, Joseph Winogradsky, Useratos Vafiades and Louis Hatios, Defendants-Appellants; and that said case may be reviewed and determined by this Court and the decision therein reversed; and that your petitioner may have such other or further relief as to this Honorable Court may seem appropriate.

Dated, April 23, 1941.

Respectfully submitted,

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES and LOUIS HATIOS,

by KENNETH E. WALSER,
Attorney.